SUPREME COURT, U. S.

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FILED
DEC 10 1974
ODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974
No. 74-529

ISAAC JOHNSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO

PETITIONER'S REPLY BRIEF

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I

This Reply has been impelled by certain serious flaws in the *Respondent's Brief in Opposition.*

In the Brief in Opposition, at page 4, it is stated that George Randle, the informer in this case, was a "former heroin addict." If this statement were meant only to convey the idea that Randle viewed himself as such, the statement would still be erroneous. This is so because Randle admitted to using heroin at all times during his participation in the events involved in this case. Not only this, the facts showed he was, by his own admission, an uncured drug addict even as he testified.

As to the statement, also in the Brief in Opposition, that Randle had worked as an "undercover agent" for the past two years (*ibid.*), this statement is not only deceptive but as applied to this case, it is untrue.

Now admittedly, Randle testified this was the fact, but the Record shows this to have been impossible. Here, the Record shows Randle had been arrested on June 29, 1972, on the basis of a June 15, 1972, indictment charging that he had sold heroin to a Cleveland policeman on April 11, 1972. He was arraigned on this charge in July, 1972, and entered a plea of not guilty. Within a month or so after this he propositioned the narcotics detectives for a deal on his own case.

The facts support the inference Randle was told to make a case against Johnson and his (—that is, Randle's) case could be adjusted. Stated another way, he must have been directed to Johnson, for the basic charges here were based on Randle's testimony as to the events that assertedly occurred on August 16, August 18, and September 5, 1972. Randle's indictment was dismissed four days after his very first effort as an informer—that is, on *August 22, 1972*, and only then after he was told the charges therein could be revived (See *Petition for Writ of Certiorari*, pp. 4-5).

Hence, it would only follow that inasmuch as this addict-witness had sought out the police for his deal in August, 1972, it could not have been two years that he had been "an undercover agent" (if in fact that is what he was when he testified) on November 9, 1973. To be sure then, even assuming he was still informing on and/or framing people on this date, it is obvious two years had not expired.

Then there is the statement crediting Randle with having testified he was "no longer using drugs." This

language too falls in the same category as indicated above—it is both deceptive and inaccurate. It is deceptive in the sense that it suggests that Randle's testimony that he was on a methadone program proves he was no longer using heroin, and it is inaccurate in that it fails to recognize methadone as a narcotic drug. On the other hand, the mere fact that Randle had recently enrolled in this type of program does not prove he was a faithful adherent to the program.

II

Other aspects of Respondent's factual narration likewise contain comparable defects. Here what is being referred to is the Respondent's total reliance on the naked assertions by the addict-witness that the person who sold him the contraband was the Petitioner.

As the Respondent views this situation, Randle's testimony should be credited because the officers verified that Randle had been searched before, and was viewed as, he entered the premises where the transactions supposedly took place. And, on *one* of these occasions (August 18) Randle was observed talking to Petitioner. What is being overlooked, we suspect deliberately, is the fact that on each of the occasions Randle entered this restaurant there were a number of other people present, and some of these people engaged Randle in conversation. Not only this, the officer who says he saw Johnson on the premises on August 18, could not credit him (Johnson) with having said anything even remotely relating to a narcotics transaction.

Again referring to Respondent's efforts to show corroboration, we have the statement that, "Detective Zimlich heard Randle ask the Petitioner for a 'half a tea' of heroin" (Respondent's Brief in Opposition, pp. 5-6). To begin with,

the most that can be said for this statement is that Officer Zimlich heard Randle ask for a "half a tea" at a time when he (Zimlich) knew Johnson and others were on the premises. The fact that he could not credit Johnson with having said or done anything in response to this statement, reduces the statement made by Randle to a meaningless utterance.

Then there is the statement, in Respondent's Brief, that Detective Gaughan "was present at all of the controlled purchases" (*ibid.*). Translated, this can only mean Detective Gaughan was in a car parked on a different street from the one where the restaurant was located, and that he could not see what happened inside, nor could he identify any of the participants in the alleged transactions. Any other interpretation on the quoted statement would differ from Gaughan's testimony.

As to the alleged transaction of September 5, 1972, the most that could be said for the alleged corroboration was that Johnson may have been on the premises when, and if, the substance delivered to officers was obtained by the addict-witness.

III

Given then the lack of any corroborating proof that Petitioner was even on the premises on August 16, and corroboration only to the extent that he was in this restaurant with others on August 18 and September 5 (when the other two transactions took place), the most that can be said then is this case depended entirely on the credibility of Johnson as opposed to that of the addict-informer-witness.

Since those who have criminal records (and none was shown here) are vulnerable to a charge that such may

be shown as bearing on their credibility (R. C. of Ohio, §2945.42), it seems quite strange to say an accused is not entitled to be the beneficiary of an instruction focusing upon the credibility of an admitted narcotic addict—especially one who at all times acted for mercenary and ulterior reasons.

IV

Respondent's stated reasons for denying this writ seem to reduce themselves to a plea that a state court should be allowed to convict on general principles. This position they maintain in spite of the fact that the presence of an addict-informer-witness in any case poses a serious problem. This is especially so when his purpose is not only selfish and ulterior, but must be successful lest he suffer a prosecution for his own provable crimes. Given then a witness who is virtually at the mercy of the police, it is most difficult to see how a right sense of justice did not require a credibility instruction that differs from the routine one given in this case.

The above argument aside, Respondent, again by resort to deceptive phraseology, would distort our position. Here Respondent states, "petitioner contends that the trial court should have charged the jury with a cautionary instruction to the effect that the testimony of the State's witnesses was inherently unreliable" (Brief in Opposition, p. 6).

Surely, this Court must know that Petitioner made no such contention. Our position is not that the trial court should have given cautionary instructions with reference to "the testimony of the State's witnesses". Rather, we contended then, and now, that special cautionary instructions should have been given with reference to the testimony of addict-informers, and with reference to testi-

mony from a witness who had received material consideration in exchange for his evidence.

Still another example of this novel pattern of Brief writing is exposed upon analysis of the following reasoning pattern:

> "The trial court gave adequate instructions on the credibility of witnesses. The trial court instructed the jury that they could believe all of the informant's testimony, that they could reject and disbelieve all of the informant's testimony, or that they could accept some parts of the informant's testimony and reject other parts of this testimony." (Brief in Opposition, pp. 6-7).

The blunt fact is that nowhere in the court's charge can this instruction be found. The word informer was not mentioned in the court's charge.

V

Other aspects of the State's arguments against the issuance of this writ, under their contentions Nos. 1 and 2, are fully answered in our Petition. This is especially so in regard to the argument that "counsel had an unrestricted opportunity and, in fact, thoroughly attacked the informant's credibility" (Brief in Opposition, p. 7). The same is true of their reliance on *United States v. Thomas* (*ibid.*).

As was argued in the Petition, the fact is that "[a]n argument to a jury, . . . on a legal issue, unsupported by an instruction to which the defendant was entitled, constitutes an aggravation rather than a mitigation of the harmful effect of the court's refusal to instruct." *United States v. Phillips*, 217 F. 2d 435, at 440 (1954).

The argument made by the State in support of its contention No. 3 is likewise premised on distortions. This is so because nowhere in the Petition is the contention made that "due process of law was violated when the informant testified." And, it is a misstatement to say that the Record does not support our contention that Randle received a benefit in exchange for his role in this case.

In our judgment, to argue, as the State does, that a man under indictment for selling drugs to a police officer who sought out the police for a deal received no benefit when his case is dismissed is to take an unrealistic position. For, not only does such an argument disparage reality, it shows more than a mere willingness to have this Court reject our thesis, it mirrors a willingness that the Court even accept their less than accurate evaluation of the Record if no other basis exists for denying review of this case.

As viewed by the defense, the facts show Randle received the payment he sought when he made the deal with the police. The discharge of his case in exchange for his efforts, insofar as this Petitioner was concerned obviously must be deemed the *quid pro quo*.

The facts bearing this out show that this witness' first effort as an informer occurred on August 16, 1972. His second effort was on August 18, 1972. These are two of the dates in this case. Randle's indictment was dismissed on August 22, 1972. Surely one can only conclude there was a relationship between the dismissal and Randle's role as an informant. At the very least, the jury should have been advised as to how to weigh this circumstance. If they concluded such a relationship existed, then Petitioner was entitled to have Randle's testimony deflated by that fact.

CONCLUSION

For all of the reasons herein as well as the reasons set forth in the original Petition for Writ of Certiorari, the review being sought here should be granted this Petitioner.

Respectfully submitted,

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